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A SUGGESTED CLASSIFICATION OF UTTERANCES ADMISSIBLE AS RES GESTAE

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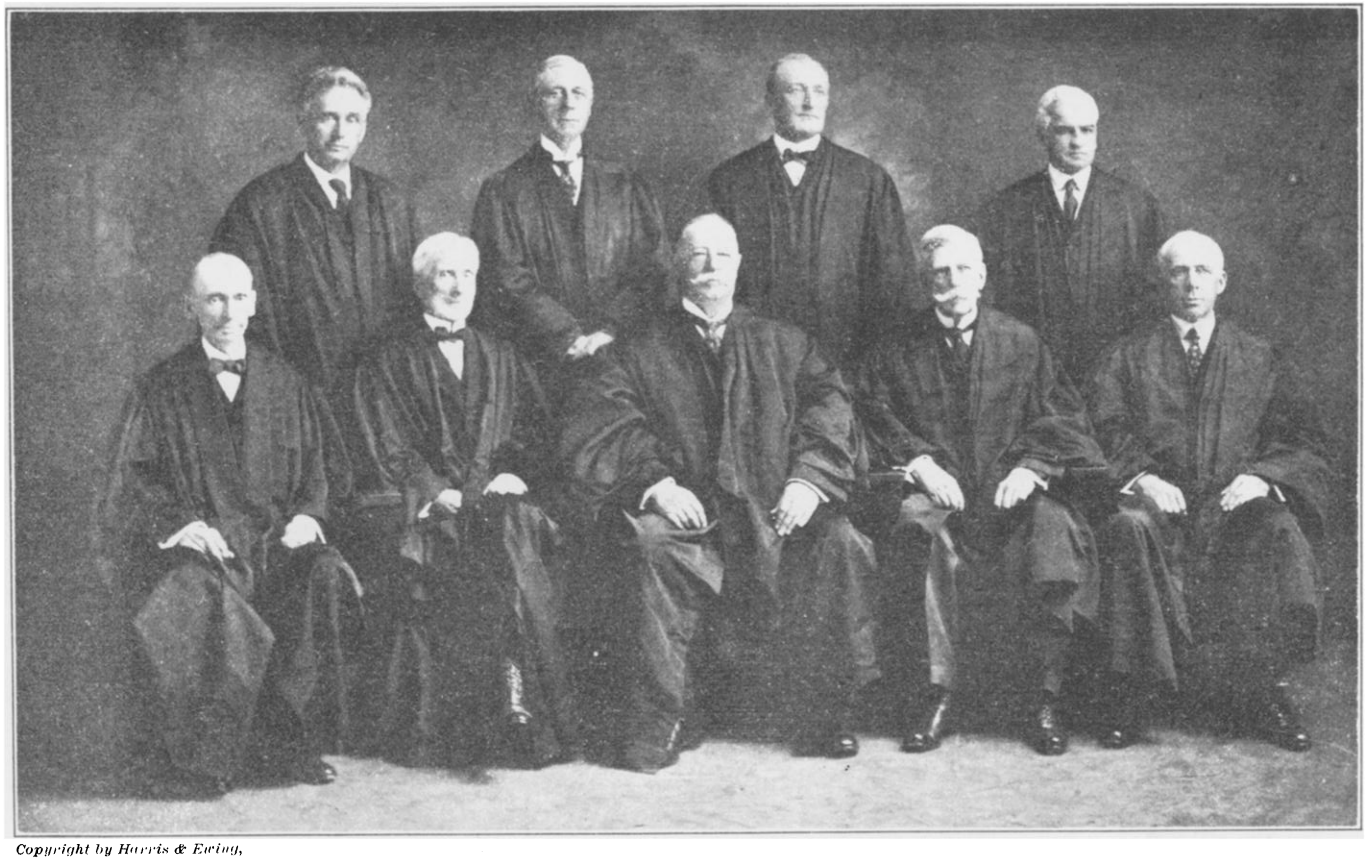
The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as *"res gestae."* It is probable that this troublesome expression owes its existence and persistence in our law of evidence to an inclination of judges and lawyers to avoid the toilsome exertion of exact analysis and precise thinking.[1] Certain it is that since its introduction at the close of the eighteenth century, on account of its exasperating indefiniteness it has done nothing but bewilder and perplex.[2] It has been employed in

[1] Thayer points out that it is first used by "Garrow and Lord Kenyon—two famously ignorant men." He says that lawyers and judges "seem to have caught at this expression as one that gave them relief at a pinch. They could not in the stress of business, stop to analyze minutely; this valuable phrase did for them what the limbo of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one—some things belonged there, others might, for purposes of present convenience be put there. We have seen that the singular form of phrase soon began to give place to the plural; this made it considerably more convenient; whatever multiplied its ambiguity, multiplied its capacity; it was a larger 'catch-all.'" Thayer, *Bedingfield's Case* (1881) 15 AMER. L. REV. 1, 10; Thayer, *Legal Essays* (1908) 207, 245.

[2] Even so distinguished a scholar as Professor Greenleaf failed to clarify the subject, if, indeed, he did not add to its obscurity. The controversy over *Bedingfield's Case* (1879, Cr. Ct.) 14 Cox. C. C. 341, between Chief Justice Cockburn and Mr. Pitt Taylor served only to demonstrate the impossibility of getting definite concepts from authorities expressed in loose phraseology. The learned Chief Justice could find no aid in the treatise of Greenleaf or in that of Taylor, which, in this respect as in many others, merely copied Greenleaf. Mr. Taylor conceded



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THE SUPREME COURT OF THE UNITED STATES

almost every conceivable connection to warrant the admission or exclusion of evidence.[3] When applied to designate non-verbal facts admissible because relevant to the matter in issue.[4] it does little harm, though surely nothing is to be gained by expressing in a dead and foreign tongue an idea for which there are accurate and adequate English words. When used to describe utterances, it works unmitigated mischief. As a basis for any intelligent consideration of the cases, it must be borne in mind that the rule against hearsay is applicable only where the utterance is offered to prove the truth of the matter asserted in it.[5] The reason is obvious. When a witness in court offers evidence regarding

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that his treatment of the topic consisted of words, "full of sound, signifying nothing," but insisted that the term "must be left unfettered by useless definition." As to the definition framed by the Chief Justice, it left Mr. Taylor "enveloped in a fog, dense as that by which I am now, as I write, surrounded." See Thayer, *Bedingfield's Case* (1880) 14 AMER. L. REV. 817-827; Thayer, *Legal Essays* (1908) 207-219. Professor Thayer's theory of the proper use of the term to describe an exception to the hearsay rule, as expounded in his article on *Bedingfield's Case,* "in substantially all points. . . .stood the test of his many years of later study." Thayer, *Legal Essays* (1908) 207. Yet Dean Wigmore, while accepting Professor Thayer's history of the phrase and his exposition of its application to cases of agency, totally ignores this theory. See 2 Wigmore, *Evidence* (1904) secs. 1795, 1797. Mr. Chamberlayne's use of the term makes the confusion worse.

[3] For some curious uses of the phrase, see 3 Wigmore, *op. cit.* sec. 1797; *Lyons v. Corder* (1913) 253 Mo. 539, 162 S. W. 606 (to admit entries made in the regular course of business); *Swearingen v. Bray* (1913, Tex. Civ. App.) 157 S. W. 953 (to admit declarations made to induce witness to sign statement, which he is now seeking to explain). In the discussion of *Bedingfield's Case, supra,* Mr. Taylor and Chief Justice Cockburn had much to say concerning fresh complaint in rape. As fully explained by both Thayer and Wigmore, the fact of complaint is received to overcome the inference of consent which failure to complain would permit; and where the details of the complaint are admitted, they are usable, not for the truth of the matter asserted, but to support the credibility of the prosecutrix who has been impeached. 2 Wigmore, *op. cit.* secs. 1134-1140; Thayer, *op. cit.* 221-233. Of course, the circumstances might be such as to bring the complaint within the seventh class of cases *infra.* See 3 Wigmore, *op. cit.* secs. 1760-1761. The doctrine is often applied to declarations of agents made in the scope of their employment, and declarations of co-conspirators made in furtherance of the conspiracy. The questions here involved concern the substantive law of agency and conspiracy. When the substantive law of agency or conspiracy makes one person responsible for the declarations of another, the declarations of the latter are admissible against the former in those cases, and in those cases only, where his own declarations would be admissible against him. See 3 Wigmore, *op. cit.* 1797.

[4] See, for example, *Louisville & N. Ry. v. Stewart* (1900) 128 Ala. 313, 29 So. 562; *Emerson v. Butte Electric Ry.* (1912) 46 Mont. 454, 129 Pac. 319.

[5] See 2 Wigmore, *op. cit.* secs. 1361-1363, 1768. If the following passage from Thayer stood alone, it would seem to indicate his dissent from the conclusion stated: "Observe, then, that the hearsay rule operates in two ways: (a) it forbids using the credit of an absent declarant as the basis of an inference, and (b) it forbids using in the same way the mere evidentiary fact of the statement as having been made under such and such circumstances."

But a few pages earlier, he says: "We do have, on the other hand, a rule aimed in general at preventing the tribunal from using as the basis of an inference the

a matter within his own knowledge, he is under oath and subject to cross-examination. If he reports the utterance of another, he is, as to the fact and content thereof, in exactly the same situation as if he were reporting any non-verbal event of which he has knowledge. His oath and the cross-examination, however, are guaranties only that he is himself speaking the truth, and not at all that the person whose utterance he is reporting was speaking the truth. When the fact and content of such person's utterance, regardless of its truth, are relevant and material, there is no reason for excluding the testimony of the witness concerning them. But when the utterance is offered for its truth, then the witness is testifying only to its fact and content, and the utterer is testifying to the matter asserted in the utterance. As the utterer is not under oath and is not subject to cross-examination, his testimony is ordinarily deemed too untrustworthy to be received. If it is to be admitted, it must be because there are some good reasons for not requiring the appearance of the utterer and some circumstance of the utterance which performs the functions of the oath and the cross-examination. In other words, it must be under some exception to the rule against hearsay. This distinction, like many others, is often disregarded by those who put their trust in the "convenient obscurity" of *res gestae*. It is in the following classes of cases that the phrase is most frequently employed to justify the admission of oral or written utterances.

1. *Cases in which the utterance is an operative fact,*—a fact which, of itself or in combination with others, creates a legal relation and without which that legal relation would not arise. Here the utterance is offered, not for the purpose of proving its truth, but merely for the purpose of showing that it was made. For example, in an action for breach of contract, a witness in behalf of the plaintiff tenders the words constituting the offer, the acceptance, or the repudiation;[6] or, in an action for defamation, the words of the alleged slander or libel are proffered. Obviously there can be no question of the admissibility of the utterance, and the hearsay rule is not involved. The *res gestae* phrase can be of no possible assistance.

2. *Cases in which the utterance, regardless of its truth, has probative value upon the question of the existence or non-existence of a material fact*—that is, of an operative fact or of a fact evidential of an operative fact. That is to say, the fact that the utterance was made is, of itself, circumstantial evidence of the existence or non-existence of a material fact: no reliance is placed upon the credit of the utterer;

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credit of any person not examined under oath in open court, and which to that end excludes all statements that *may* have support from the credit of such unexamined person; and then we have exceptions to the rule. Some statements are not included in the rule simply because they *cannot,* in their relation to the case,—*i. e.,* having regard to the purpose for which they are received,—derive strength from the credit of the declarant." See Thayer, *op. cit.* 270, 266.

[6] See, for example, *Baughan v. Brown* (1889) 122 Ind. 115, 23 N. E. 695.

whether his utterance be true or false is of no importance. A familiar specimen of this class is found in those cases where the material fact is the condition of mind of the person to whom the utterance is communicated. If a defendant charged with bigamy is relying upon the defence that the first spouse has been absent for seven years and the second marriage was contracted in good faith in the belief that the first spouse was dead, evidence that A had, within a few months before the second marriage, informed the defendant that B had told A that C had recently seen and talked with the absent spouse, is clearly admissible on the issue of the defendant's good faith, though it is clearly inadmissible on the issue of the life or death of the absent spouse. Again, where a fact to be proved is the diligence or lack of diligence of an officer in attempting to serve process, the inquiries which he made and the answers which he obtained are receivable;[7] but if offered to show the truth of the matter asserted in these statements, they are plainly obnoxious to the hearsay rule. Utterances may constitute circumstantial evidence of the state of mind of the utterer, as, for example, where, to show his insanity, it is offered to prove that he uttered incoherent statements. They may be circumstantial evidence of the non-existence of an operative fact, as where, in an action for breach of contract, the defendant tenders evidence of words of mere negotiation to show that he did not use words of offer. Indeed, the facts of the existence or non-existence of which an utterance may be circumstantial evidence, are limited only by rules of relevancy.[8] In all such cases, however, the hearsay rule can have no application, and a resort to the phraseology of *res gestae* can serve no useful purpose.

3. *Cases in which the operative effect of non-verbal conduct depends upon verbal conduct accompanying it.* Here the non-verbal conduct is ambiguous, and the verbal conduct resolves, or tends to resolve, the ambiguity. The utterance may be, and frequently is, an operative fact. For example, when A delivers money to B, he may be making a gift, he may be making a loan, he may be paying a debt. His actual intention is immaterial; his expressed intention is decisive. Thus, if on handing over the money he uses words reasonably understood by the transferee as words of gift, he may not thereafter charge the transferee as with a loan, even though at the moment of transfer he intended to do so and believed his words manifested that intention. Or the verbal conduct may be merely circumstantial evidence of the existence or non-existence of an operative fact. Where the issue is title by adverse possession, notoriety of the claim is an operative fact. If the alleged adverse possessor while in possession makes a statement of claim to a third party, this constitutes circumstantial evidence tend-

[7] *Phelps v. Foot* (1815) 1 Conn. 387; *Gering v. School District* (1906) 76 Neb. 219, 107 N. W. 250; *Dale v. Colfax Co.* (1906) 131 Iowa, 67, 107 N. W. 1096.

[8] In these first two classes clearly belong the cases dealing with utterances of agents and co-conspirators; also the declarations of fresh complaint in rape which do not come within class seven. See *supra* note 3.

ing to show the claim notorious. In either situation the words are offered, not for their truth, but merely to show the fact of their expression. In the former, so far as the admissibility of the utterance is concerned, the case is identical with those in class one; in the latter, with those in class two. The competency of the evidence is beyond question, and the hearsay rule is totally inapplicable.

4. *Cases in which the operative effect of non-verbal conduct depends upon the intent which accompanies it.* As in the preceding class, the non-verbal conduct is ambiguous. The intent of the actor at the time of the act is an operative fact. The utterance may be a direct declaration of such intent, as where a testator, while destroying or mutilating a will, says that he intends revocation. It may be a direct assertion of a state of mind when that state of mind is circumstantial evidence of such intent, as where a debtor, while leaving the jurisdiction, states his fear of his creditors. The intent to evade his creditors is an operative fact; the fear of them is circumstantial evidence of his intent to evade them, and his utterance is offered, not circumstantially but directly, to prove his fear. The utterance may be circumstantial evidence of a state of mind which, in turn, is circumstantial evidence of the intent, as where a resident of X, while removing therefrom to Y, utters imprecations upon X and all its inhabitants, either reverently or blasphemously calling down upon them the condemnation of the Almighty. If domicil is in issue, the intent at the time of removal is an operative fact; the hostility of the declarant is circumstantial evidence of his intent to abandon X as his residence, and his utterance is circumstantial evidence of his hostility. Where the utterance is merely circumstantial evidence of the state of mind, it is not offered for the truth of the matter asserted and does not violate the rule against hearsay. So far as its admissibility is concerned, it is identical with the cases in class two, for it has, regardless of its truth, probative value upon the question of the existence of a particular state of mind of the utterer. Where it is a direct declaration of such state of mind, it is clearly offered for the truth of the matter asserted and is hearsay. If admitted, it must be under some exception to the hearsay rule. If it is a direct statement of a past state of mind, it must stand on the same footing as other declarations of past events. The mere fact that it accompanies the ambiguous non-verbal act furnishes no reason for admitting it.[9] If it is a direct statement of a presently existing state of mind, it comes within the next class.

5. *Cases in which the utterance is a direct declaration of a presently existing mental condition,*[10] *made naturally and without circumstances of suspicion.* The utterance, being offered for its truth, is hearsay, but it is now generally recognized as competent as an exception to the hearsay rule. This exception had its origin in the case of *Aveson v.*

[9] *Baswell v. Davis* (1839) 10 N. H. 413.

[10] This includes subjective bodily condition.

Kinnaird,[11] wherein Lord Ellenborough admitted statements of the declarant's then condition of health on the same theory on which, as he asserted, declarations of the injured wife were admitted in *Thompson v. Travanion,*[12] as part of the *res gestae.* It was developed and expanded during the nineteenth century, and particularly during its latter half. It now stands as a separate exception upon its own basis.[13] It needs no aid from so uncertain a doctrine as *res gestae.*

In these five classes, then, there is but one situation wherein the hearsay rule is involved. In the first three it has no bearing. In the fourth, the utterances not offered for their truth fall into the second class; the others, so far as admissible, into the fifth. The characteristics of the third class are that the non-verbal conduct is ambiguous, and that the verbal conduct tends to resolve the ambiguity. This means nothing more than that on account of the nature of the non-verbal conduct, the verbal conduct is relevant and material. The characteristics of the fourth class are that the objective non-verbal conduct is ambiguous and that the intent with which it is performed resolves the ambiguity. If the utterance circumstantially evidences the intent, it is for that reason relevant. If it is a direct statement of the intent, it is none the less relevant, but its competency is challenged by the hearsay rule. If it is of a presently existing intent, it is competent under an exception to that rule. If this analysis is correct, then the require-

[11] (1805, K. B.) 6 East, 188, 195. "The declaration was upon the subject of her own health at the time, which is a fact of which her own declaration is evidence; and that too made unawares before she could contrive any answer for her own advantage and that of her husband, and therefore falling within the principle of the case in *Skinner,* which I have alluded to." The allusion was to his remark to counsel during argument that Lord Chief Justice Holt had allowed the wife's statements "to be given in evidence as part of the *res gestae.*" See note 12 *infra.*

[12] (1694, N. P.) Skin. 402. In an action for assault and battery upon the wife, Holt, Chief Justice, ruled that "what the wife said immediate upon the hurt received, and before that she had time to devise or contrive anything for her own advantage, might be given in evidence."

[13] That basis is expressed as follows by Mr. Justice Gray in *Mutual Life Ins. Co. v. Hillmon* (1891) 145 U. S. 285, 295, 12 Sup. Ct. 909, 912: "The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his testimony that he then had that intention would be. After his death there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation." To the same effect, see Mr. Justice Holmes in *Elmer v. Fessenden* (1890) 151 Mass. 359, 361, 24 N. E. 208: "We rather agree with Mr. Starkie, that such declarations made with no apparent motive for misstatement may be better evidence of the maker's state of mind at the time, than the subsequent testimony of the same persons." Compare Mellish, L. J., in *Sugden v. St. Leonards* (1876, C. A.) L. R. 1 Prob. Div. 154: "Whenever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions are."

ments in the third class, that the utterance shall accompany the non-verbal conduct and tend to explain it, are requirements of relevancy only and represent merely one application of the principle governing the cases in the first and second classes. And the frequent statement in the cases of the fourth class that the utterance offered to show the intent must be contemporaneous with the act, is due to a failure to perceive that the intent of the actor at the time of the ambiguous act may be circumstantially evidenced by his state of mind at another time not too remote, and this in turn may be proved by his declarations of his then existing state of mind. Thus, in *Rawson v. Haigh*,[14] the declarations of the bankrupt were made a month after his departure from the realm; the court, treating the departure as the ambiguous act, seemed to think it necessary to find a theory by which the departure and the declarations might be considered as contemporaneous or so connected by circumstances as to form parts of one and the same continuing act. In fact, the declarations were clearly admissible to show the then existing condition of mind of the bankrupt, and this condition of mind was, under the circumstances plainly relevant to show his condition of mind at the time of departure. Similarly in *Durham v. Shannon*,[15] the declarations of an alleged buyer of his intention to buy, made two days before the transfer, were admitted as contemporaneous. Obviously they were not so; but as declarations of his intent at the time of making them, they were admissible, and his intent at that time was evidence of his intent at the time of transfer. These two cases are but examples of myriads wherein the courts have done totally unnecessary violence to the definition of the term, contemporaneous, sometimes attempting to hide the offense under the convenient adverb, substantially.

The discussion of cases in classes four and five has been rendered the more obscure by the introduction of the phrase "verbal act" which, as commonly used, is less vague than *res gestae* only because it is couched in English, instead of Latin. It is said that in these cases, the utterance is admissible as a verbal act or a verbal part of an act. It must be obvious that every utterance is a verbal act, so that the term, properly defined, signifies nothing more than an act consisting of words. Since, however, acts are often popularly contrasted with words, its use might, with much plausibility, have been confined to utterances entirely without the scope of the rule against hearsay, because not offered to prove the matter asserted in them. So limited, it would have been convenient, if not helpful. In such event, it could never have been applied to a direct declaration of a state of mind offered to prove that state of mind. And yet it is so applied in cases of the fourth class not only by courts but even by the most careful commentators.[16] And it may be said generally that it is frequently used to admit utterances which do not fall readily within any well recognized exception to the rule against hearsay

[14] (1824, C. P.) 2 Bing. 99. [15] (1888) 116 Ind. 403, 19 N. E. 190.

[16] See 3 Wigmore, *op. cit.* secs. 1772, 1782-1784.

but which the court desires to receive. It is, therefore, positively harmful to clarity of statement and of reasoning.

The uncertainty of the limits of the doctrine governing cases in the third and fourth classes, as manifested in the vagueness of the phrases, *"res gestae"* and "verbal act," in the failure to distinguish between hearsay and non-hearsay, and in the expansion of the definition of con temporaneous, is increased by paraphrases of the statement that the utterance must tend to resolve the ambiguity of the non-verbal conduct. Courts are found saying that the words must "qualify," "unfold the nature and quality of," "explain," "elucidate," or "reflect light upon" the act.[17] Furthermore, in the first and second classes, ambiguity in the non-verbal conduct is immaterial. Under such circumstances, it is not astonishing to find the precedents interpreted as justifying the admission of declarations accompanying non-ambiguous acts, as in the next class.

6. *Cases in which the utterance is contemporaneous with a non-verbal act, independently admissible, relating to that act and throwing some light upon it.* Here the utterance is offered to prove its truth and is obnoxious to the hearsay rule. Is there any justification for admitting it? What substitutes for the oath and cross-examination can be found to give it reliability? A statement by a person as to external events then and there being perceived by his senses is worthy of credence for two reasons. First, it is in essence a declaration of a presently existing state of mind, for it is nothing more than an assertion of his presently existing sense impressions. As such it has the quality of spontaneity.[18] All the reasons supporting the decisions in the fifth class are equally applicable here. Second, since the statement is contemporaneous with the event, it is made at the place of the event. Consequently the event is open to perception by the senses of the person to whom the declaration is made and by whom it is usually reported on the witness stand. The witness is subject to cross-examination concerning that event as well as the fact and content of the utterance, so that the extra-judicial statement does not depend solely upon the credit of the declarant.[19] Unless exact contemporaneousness is insisted upon,

[17] See, e. g. *Wright v. Doe dem. Tatham* (1873, Exch. Ch.) 7 Ad. & El. 313, 361; *Enos. v. Tuttle* (1820) 3 Conn. 247, 250; *Travelers' Ins. Co. v. Mosley* (1869, U. S.) 8 Wall. 397, 411.

[18] The idea here presented is expressed by Mr. Justice Somerville in *Illinois Central Ry. v. Lowery* (1913) 184 Ala. 443, 447, 63 So. 952, 953: "Such a declaration, to have testimonial verity and value, and hence to be admissible by way of exception to the rule that excludes hearsay in general, must directly relate to and in some degree illustrate and explain the occurrence in question; and, essentially, it must be the apparently spontaneous product of that occurrence operating upon the visual, auditory, or other perceptive senses of the speaker. The declaration must be instinctive rather than deliberative—in short, the reflex product of immediate sensual impressions, unaided by retrospective mental action. These are the indicia of verity which the law accepts as a substitute for the usual requirements of an oath and opportunity for cross-examination."

[19] "An English judge once said that he hardly ever ended a day of trying cases in

the first of these guaranties is partially lacking and the second is weakened. Therefore no such amplification of the definition of contemporaneous can be tolerated as is found in the cases in the fourth class. And yet the declaration may be so close to the event in point of time and space that these guaranties will be substantially present, in which case the utterance may well be received. Much should be left to the discretion of the trial court. It is to be noted that the spontaneity of the utterance is warranted by its contemporaneousness with the event and by the presence of another capable of observing the phenomena which the declarant is reporting. Consequently it is not at all essential that the event should be of a startling or exciting nature or that it should shock or alarm the declarant. For example, where the declarant was in his home, and in a perfectly normal way witnessed a train enter a nearby cut, his contemporaneous remark, that the train was entering the cut without first stopping, was held competent.[20] But it very frequently happens that the event is of such a nature as to produce a nervous shock to the declarant, which causes his utterance to be spontaneous and unreflecting. This circumstance has been one of the factors leading to a growing recognition of the admissibility of utterances of the next class.

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court without thinking during some part of it, amidst the conflict of testimony, that he would give almost any price for a memorandum in writing made by the parties *at the time* of the transaction. The exception to the hearsay rule which is now mentioned takes notice of one of these strong elements of authenticity, contemporaneousness; it deals, however, not with memoranda signed by the parties, but with statements, oral or written, made about it, and importing what is present at the very time,—present either in itself or in some fresh indications of it, to the faculties of the witness as well as of the declarant. . . .

"The leading notion in the doctrine, so far as, upon analysis, it has anything to do with the law of evidence, seems to have been that of withdrawing from the operation of the hearsay rule declarations of fact which were very near in time to that which they tended to prove, fill out or illustrate,—being at the same time not narrative, but importing what was then present or but just gone by, and so was open, either immediately or in the indications of it, to the observation of the witness who testifies to the declaration, and who can be cross-examined as to these indications." Thayer, *Bedingfield's Case* (1881) 15 AMER. L. REV. 83, 107; *Legal Essays* (1908) 272, 302.

[20] *Missouri K. & T. Ry. v. Vance* (1897, Tex. Civ. App.) 41 S. W. 167; *Heg v. Mullen* (1921, Wash.) 197 Pac. 780; *Missouri Pacific Ry. v. Collier* (1884) 62 Tex. 318; *Stebbins v. Keene Township* (1885) 55 Mich. 552, 22 N. W. 37. See also, *Emens v. Lehigh Valley Ry.* (1915, N. D. N. Y.) 223 Fed. 810; *Norfolk & W. Ry. v. Gesswine* (1906, C. C. A. 6th) 144 Fed. 56. The following cases are opposed. It is submitted that they are unsound. *Chicago, etc., Ry. v. Cummings* (1899) 24 Ind. App. 192, 53 N. E. 1026 (the court cites no cases in point, quotes many general definitions of *res gestae,* and does lay some emphasis upon the fact that the witness was not at the place of the accident but in the quiet of her own home); *Gouin v. Ryder* (1915) 38 R. I. 31, 94 Atl. 670 (like the case of *Heg. v. Mullen;* cites no authorities; emphasizes fact that witness was a bystander and did not see the accident or plaintiff's danger). See also *Marlatt v. Erie Ry.* (1921, N. Y.) 154 App. Div. 388.

7. *Cases in which the utterance is made concerning a startling event by a declarant laboring under such a stress of nervous excitement, caused by that event, as to make such utterance spontaneous and unreflective.* As in the preceding class, the utterance is offered for its truth and is hearsay. Its sole guaranty of trustworthiness lies in its spontaneity. The essentials of this theory are found in the early case of *Thompson v. Trevanion,*[21] around which Lord Ellenborough cast the fog of *res gestae,* and which Chief Justice Cockburn repudiated in *Bedingfield's Case.*[22] In this country but few cases prior to 1880 gave weight directly to the element of spontaneity,[23] and fewer still to the fact that spontaneity was insured by the startling nature of the event. Indeed contemporaneousness rather than spontaneity was emphasized. although the latter was clearly recognized as highly important. Thereafter such cases are somewhat more numerous; but it is only since the publication of Dean Wigmore's work that this exception to the hearsay rule has gained wide recognition.[24] It is, however, by no means universally accepted,[25] and nowhere is the theory of the exception applied

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[21] *Supra* note 12.

[22] *Supra* note 2.

[23] Thayer seems to have disapproved cases clearly admissible under this theory. See Thayer, *Legal Essays,* 264, and authorities *supra* note 2.

[24] See 3 Wigmore *op. cit.* secs. 1745-1765. An excellent example of the application of this theory to an utterance made by a severely injured declarant forty-five minutes after the event and at a place distant therefrom is found in the following excerpt from the opinion of Mr. Justice Dibell in *Roach v. Great Northern Ry.* (1916) 133 Minn. 257, 260, 158 N. W. 232, 233: "There is some element of discretion in the trial court in determining whether a statement is a part of the *res gestae.* . . . . In passing upon the admissibility of testimony claimed to constitute a part of the *res gestae,* the trial court determines whether unsworn statements are so accredited that they may go to the jury and be weighed and valued by it, and in determining this it considers whether the statements are spontaneous; whether there was an opportunity for fabrication or a likelihood of it; the lapse of time between the act and the declaration relating to it; the attendant excitement; the mental and physical condition of the declarant, and other circumstances important in determining whether the trustworthiness of the unsworn statements is such that they may safely go to the jury. In reviewing the trial court's ruling this court defers to its determination of the preliminary facts bearing upon the propriety of receiving the testimony. To this extent its admissibility is within the sound discretion of the trial court. . . .

"A considerable time, measured in minutes elapsed between the accident and decedent's statements relative to it—a time longer than is usual when the application of the *res gestae* doctrine is sought. Time is an important factor. It is not always, but sometimes may be controlling. The lapse of time may give such an opportunity for fabrication that the testimony cannot be received safely, or in a particular case it may itself suggest the fact of fabrication. The circumstances were such that the trial court could well enough find that there was no probability of fabrication, that the statements were made at a time when, through intense suffering and nervous excitement, the reflective faculties of the decedent were not operative in his own interest, and that they were naturally illustrative of the accident and not designed to help his cause. We cannot say the court erred in receiving them."

[25] See, for example, *Eastman v. Boston & Maine Ry.* (1896) 165 Mass. 342, 43

with logical completeness. If spontaneity of itself is to be accepted as a guaranty of trustworthiness, then the subject matter of the declaration should not be limited to the startling event which operated to still the reflective faculties. Yet it is everywhere so limited. There is also a marked tendency in many cases to assume that contemporaneousness of utterance and event is a requisite of admissibility, and to argue that it is satisfied where the facts show the utterance unreflective, instead of using lapse of time between event and utterance merely as evidence of lack of spontaneity. Likewise there is frequent insistence that the utterance be made at the place of the event. In short, there is still much confusion between cases of this class and those of classes three, four, and six.

In none of these seven classes can anything but perplexity and difficulty arise out of the use of such loose and inaccurate phrases as *"res gestae"* and "verbal act." Utterances offered for purposes other than to show the truth of the matter asserted in them have generally to meet only the tests of relevancy and materiality under the rules of substantive law. Utterances offered for the truth of the matter asserted in them, so far as they fall outside of classes five, six, and seven and outside of recognized exceptions to the hearsay rule other than *res gestae,* should be rejected. So far as they fall within any one of these classes, they should be admitted. In all three classes the element of spontaneity is present in some degree. In the fifth class the contemporary declaration of the declarant's state of mind is, in the absence of suspicious circumstances, likely to accord with the fact, and is more likely to be accurate than his later recollection of it. In the sixth class the declaration is likely to be true because it is *prima facie* a spontaneous expression of the declarant's existing sense impressions made in the presence of a person capable of testing its accuracy or inaccuracy by his own observation of the event, and the danger of its being given greater weight than it deserves is greatly diminished, if not destroyed, by the opportunity to cross-examine the witness in court concerning the event itself.[26] In the seventh class the declaration is likely to be true because the mental condition of the declarant is such that the probability of his being able to devise a falsehood is very remote. In each class the guaranties of trustworthiness are quite as adequate as in other well established exceptions to the rule against hearsay.

N. E. 115; *McCarrick v. Kealy* (1898) 70 Conn. 642, 40 Atl. 603, 42 L. R. A. (N. S.) 917, note. It is curious to note that the same court sometimes seems to accept the doctrine at its face value in one case and to refuse to apply it to another indistinguishable either in principle or on the facts. Cf. *People v. Del Vermo* (1908) 192 N. Y. 470, 85 N. E. 690; *Greener v. General Electric Co.* (1913) 209 N. Y. 135, 102 N. E. 527.

[26] The impression is gained from a study of Dean Wigmore's discussion of this subject that he would abolish the exception to the rule against hearsay applied in the cases in class six. See 3 Wigmore, *op. cit.* secs. 1750 (a), 1774. It is respectfully submitted that the guaranties of trustworthiness in cases of class six are quite as adequate as in those of class seven.